Supreme Court, U.S.
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No. 95-1337

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RICHARD W. BRITTON,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does allowing a key government witness to instruct the jury on how to operate their audio equipment constitute a prejudicial violation of the Petitioner's Due Process Right to a fair trial by an impartial jury?

II. Does allowing a key government witness to prepare the only transcript of a partially inaudible audio tape read by the jury contemporaneously with the airing of the audio tape constitute a violation of the Petitioner's Due Process Right to a fair trial by an impartial jury?

III. Does the two (2) level enhancement of a sentence pursuant to USSG Section 2D1(b)(1) for "possession of a firearm during commission of the offense" apply to a firearm discovered eight (8) months after the offense was committed in the gun shop of a licensed firearm dealer when no evidence was presented that Petitioner possessed the weapon at any time in connection with the underlying offense?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Authorities	v
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	6
Argument I	6
Argument II	8
Argument III	10
Conclusion	15

INDEX TO APPENDICES

Appendix A

Judgment of the United States District Court for the Eastern District of Missouri on March 6, 1995 ..... A-1

Appendix B

Judgment and Opinion of the United States Court of Appeals, Eighth Circuit filed on October 19, 1995 ..... A-9

Appendix C

Reproduction of USSG Section 2D.1..... A-15

Appendix D

Proceedings on the Imposition of Sentence dated March 27, 1995 before the Honorable Carol E. Jackson ("Sentencing Transcript") A-18

TABLE OF AUTHORITIES

	Page(s)
Cases:	
Gonzales v. Beto, 405 U.S. 1052 (1972)	7,8
Remmer v. United States, 347 U.S. 227 (1954)	6,8
Turner v. Louisiana, 379 U.S. 466 (1964)	7,8
United States v. Bost, 968 F.2d 729 (8th Cir. 1992)	11,13
United States v. Dinges, 917 F.2d 1133 (8th Cir. 1990)	14
United States v. Enright, 579 F.2d 988 (6th Cir. 1966)	8
United States v. Halderman, 559 F.2d 31 (D.C. Cir. 1976)	8
United States v. Matthews, 5 F.3d 1161 (8th Cir. 1993)	14
United States v. McMillan, 508 F.2d 101 (8th Cir. 1974)	9
United States v. Pollard, 77 S.Ct. 481 (1957)	10
United States v. Pou, 953 F.2d 363 (8th Cir. 1992)	14
United States v. Robinson, 707 F.2d 872 (6th Cir. 1983)	9,10
United States v. Suarez, 911 F.2d 1016 (5th Cir. 1990)	13
United States v. Vasquez, 874 F.2d 250 (5th Cir. 1989)	11,12
United States v. Williams, 905 F.2d 217 (8th Cir. 1990)	14

United States v. Young, 488 F.2d 1211 (8th Cir. 1973) 9

Statutes:

18 USC Section 3742(e) 4

21 USC Section 841(a)(1) 2,13

21 USC Section 841(b)(1)(c) 2,13

28 USC Section 1254(1) 2

USSG Section 2D1.1(b)(1) 2,3,4,6, 11,12,14,15

No.

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OCTOBER TERM, 1995

RICHARD W. BRITTON,
Petitioner,

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THE UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Richard W. Britton, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit refusing to reverse the lower court's decision and remand Petitioner's case for a new trial although his constitutional right to a fair trial by an impartial jury was violated when the United States District Court, Eastern District of Missouri, allowed a key government witness to instruct the jury on how to operate their audio equipment; allowed a key government witness to prepare the only transcript of a partially inaudible audio tape read by the jury and refused to set aside the two (2) level increase in Petitioner's sentence which was enhanced for "possession of a firearm

during commission of the offense" when said firearm was found eight months after the underlying offense was committed, said weapon being found in Petitioner's gun shop, not such that it was only useful for drug offenses/offenders and said weapon was possessed by Petitioner, a licensed firearm dealer.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Eighth Circuit was filed on October 19, 1995 and appears as Appendix B to this Petition. The Judgment of the United States District Court for the Eastern District of Missouri regarding Petitioner's criminal case filed on March 6, 1995, appears as Appendix A.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on October 19, 1995. This Court's Jurisdiction is invoked under Title 28, USC Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Code, Title 21, Sections 841(a)(1) and 841(B)(1)(C) and sentencing guidelines USSG Section 2D1.1(b)(1) are at issue in the present case.

STATEMENT OF THE CASE

Petitioner was indicted on September 28, 1994, on the following charge: Knowingly and Intentionally Distributing a Quantity of Cocaine, in violation of Title 21, United States Code, Sections 842(a)(1) and 841(b)(1)(c).

Petitioner was convicted by a jury on December 9, 1994 of the above mentioned charge before the Honorable Carol E. Jackson, Judge of the United States District Court, Eastern District of Missouri.

During Petitioner's trial, a key government witness, Agent Robinson, a DEA Special Agent, Surveillance Officer and the Arresting Officer on Petitioner's case, instructed the jury on the use of audio equipment. Agent Robinson also had physical contact with the jury when he handed out the tape transcripts and headsets to the jury.

The Court allowed Mr. Robinson to instruct the jury and pass out the tape transcripts and headsets pursuant to the United States Attorney's request although Petitioner's Attorney brought to the Court's attention that Mr. Robinson was going to be a witness and the Court Clerk should be servicing the jury not a key government witness. (Trial Tr. pp. 116-117).

In addition, another key government witness, Officer Malady, the undercover agent who actually purchased cocaine from Petitioner, the underlying action for which Petitioner was convicted, was allowed to prepare the only transcript of the partially inaudible audio tape which was read by the jury contemporaneously with their listening of the audio tape. (Trial Tr. pp. 117-118).

On March 6, 1995, Petitioner was sentenced to ninety seven (97) months imprisonment and three (3) years of supervised probation by the Honorable Carol E. Jackson, United States District Judge, Eastern District of Missouri. Petitioner was sentenced under the offense level of thirty (30), including the enhancement of two (2) levels pursuant to the application of USSG Section 2D1.1(b)(1). Petitioner was rated with a criminal history category One (1) of the guidelines. The two (2) level enhancement under USSG Section 2D1.1(b)(1) was applied because of Petitioner's alleged possession of a dangerous weapon in connection with the underlying charge.

At sentencing the Court stated the following with regard to this two (2) level enhancement:

> What is important here is that there is the allegation that there was a weapon there. And what's crucial is why it was there and what relation, if any, it had to the drug trafficking. And I'm not sure how to answer that question, because here, the last drug sale was in January of 1994. And this firearm was found some nine months later — eight months later. And I am just wondering how they can be connected, if at all. I think there's a question in my mind at least on that. (Sentencing Tr. 12 - 13).

As evidenced by the Court's own reasoning at Petitioner's sentencing, cited above, the Court's enhancement of Petitioner's sentence pursuant to USSG Section 2D1.1 is suspect. The District Court enhanced Petitioner's sentence as a result of what the Court perceived to be constructive possession of weapons found at Petitioners' gun shop eight months after commission of the underlying offense. A government witness testified that Petitioner spoke of using the firearm "during transactions could have been in connection with operating his business.

The Court of Appeals' appellate jurisdiction was based upon 18 USC Section 3742(e) wherein Petitioner alleged the trial court erred by allowing a key government witness to instruct the jury on how to operate their audio equipment; thereby prejudicially violating Petitioner's Due Process right to a fair trial by an impartial jury and erred by allowing a key government witness to prepare the only transcript read by the jury of the partially inaudible audio tape; thereby prejudicially violating Petitioner's Due Process Right to a fair trial by an impartial jury. Petitioner also alleged the sentencing court erroneously enhanced Petitioner's sentence by improperly applying USSG Section 2D1.1(b)(1) and increasing Petitioner's sentence by two (2) levels accordingly.

Following Oral Argument in the United States Court of Appeals for the Eighth Circuit on June 13, 1995, the Court of

Appeals affirmed the Judgment of the United States District Court, Eastern District of Missouri, including affirmation of Petitioner's sentence as imposed by the Honorable Cared E. Jackson, District Court Judge for the Eastern District of Missouri.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for the following reasons:

1. denial of same ignores the proper standards for the administration of criminal law, specifically application of USSG Section 2D1.1 and the issue presented in Question No. III;

2. denial of same allows the Court of Appeals decision to stand in light of the fact that it contradicts precedent regarding the issues outlined in Question No. I and III; and

3. denial of same ignores the establishment of a mandate of this Court so that a precedent exists regarding all three issues outlined in Question I, II and III.

I.

A. In *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), this Court issued a Writ of Certiorari based on Petitioner's argument that extrajudicial communication between a prosecution witness and the jurors is presumptively unfair. Petitioner Britton asserts that the physical and instructional contact between Agent Robinson and the jurors does constitute extrajudicial communication; therefore, affirmation of the United States District Court, Eastern District of Missouri's decision in Petitioner's case contradicted precedent.

In review of the United States District Court, Eastern District of Missouri's decision in Petitioner's case, The United States Court of Appeals for the Eighth Circuit held that Agent Robinson was not a key government witness, his contact with the jury was brief and there was no "private" contact but only open court contact.

Agent Robinson was the Surveillance and Arresting Officer in Petitioner's case. Further, his testimony was that he administered Petitioner his Miranda Rights and testified that after doing so, Petitioner "freely admitted to being a drug dealer." (Trial Tr.

p. 169). Agent Robinson also testified that no cocaine was found in Petitioner's home or store. (Trial Tr. pp. 173-176).

In light of Agent Robinson's key role as Surveillance and Arresting Officer and in consideration of the fact that his testimony was instrumental in Petitioner's conviction, it is clear Agent Robinson was a key government witness. Furthermore, his credibility was essential to the jury's verdict. Therefore, Agent Robinson's ability to create a relationship of authority and trust extrajudicially with the jury violated Petitioner's Due Process Right to a fair trial by an impartial jury.

This Court has also recently held that any relationship that "fosters the jury's confidence," is an association that violates a defendant's due process of law. See *Turner v. Louisiana*, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1964). In *Turner*, this Court found that allowing a government witness to act as custodian for three days with the jury "fostered the jury's confidence." In Petitioner's case, the United States Court of Appeals for the Eighth Circuit held that the contact between Agent Robinson and the jury was too brief for there to be a violation of Petitioner's due process.

However, in *Gonzales v. Beto*, 405 U.S. 1052, 92 S.Ct. 1503 (1972), the Court determined that the length of time the witness spent with the jury was not a key factor in determining whether the jury's confidence had been fostered. In *Gonzales*, this Court established a mandate that the association of a government witness with the jury that is on a personal and on an official basis effectuates a "perversion" of the adversary system of justice. *Id.* at 1505.

According to the *Turner* and *Gonzales* precedents, Agent Robinson's contact with the jury was extrajudicial communication which fostered the jury's confidence; thereby, denying Petitioner his Due Process Right to a fair trial by an impartial jury.

Similarly, The United States Court of Appeals for the Eighth Circuit's determination that Petitioner's Due Process Right to a fair trial by an impartial jury was not violated because Agent Robinson's contact with the jury was in open court and not private ignores the *Turner* and *Gonzales* precedents.

B. In addition, the United States Court of Appeal's affirmation of the United States District Court, Eastern District of Missouri's decision in Petitioner's case ignores the establishment of a mandate of this Court regarding this issue.

Agent Robinson's contact with the jury was the type of authoritarian, maestro-like contact which would foster confidence in the jury and allow the jury to establish the credibility of Agent Robinson according to factors other than his testimony. To allow this contact and deny that same violates Petitioner's Due Process Right to a fair trial by an impartial jury, ignores the mandate of this Court established in the *Remmer, Turner* and *Gonzales* decisions.

II.

This Court has not addressed the issue of admission of a transcript prepared by one party to be read by the jury while listening to a partially inaudible audio tape. Petitioner Britton asserts that this Court should now address same so that a clear mandate may be established regarding this issue.

It is well established that it is within the sound discretion of a trial court to admit an audio tape and therefore, there is a presumption that any audio tape admitted must be authentic, accurate and trustworthy. See *United States v. Enright,* 579 F.2d at 988 (1966) and *United States v. Halderman,* 559 F.2d 31 (1976).

Accordingly, the Eighth Circuit has held that an audio tape with garbled portions should not be admitted into evidence depending on the purpose for which it is being offered as

evidence. See *United States v. Young,* 488 F.2d 1211 (8th Cir. 1973).

The United States Court of Appeals for the Sixth Circuit reversed and remanded a lower court which similarly allowed a government prepared transcript to be read by the jury contemporaneously with the airing of a partially inaudible audio tape although the transcript was not received into evidence. See *United States v. Robinson,* 707 F.2d 872 (6th Cir. 1983). In this case, the Sixth Circuit held that the preferred practice was not to submit transcripts to the jury unless both parties stipulated to their accuracy. In Petitioner's case, this would require the submission of a transcript to which both Petitioner Britton and the Government stipulated. At a minimum, the trial court should listen to the tape and read the transcript if the parties do not stipulate as to the accuracy of the transcript and/or allow both the defendant and the government to submit their own transcripts. Further, there was not a qualified and unbiased source which verified the government's transcript, a necessity in laying the foundation for the use of a disputed transcript. See *United States v. McMillan,* 508 F.2d 101 (8th Cir. 1974).

The Eighth Circuit, in upholding the United States District Court, Eastern District of Missouri, in Petitioner's case focused on the fact that Petitioner had the opportunity to submit his own transcript to the jury. However, contrary to the government's representation, Petitioner was only given the audio tape the day prior to trial which did not allow him time to create his own transcript of same.

The other key point the Eighth Circuit highlighted in upholding the United States District Court, Eastern District of Missouri, is that Petitioner did not claim any inaccuracies of the transcript during his testimony and in fact, did not challenge the accuracy of the transcript. To the contrary, Petitioner did contest the accuracy of the transcript and testified that the transcript could be very misleading. (Trial Tr. p. 25). Furthermore, Petitioner

testified numerous times that he did not recall saying what the transcript reflected that he said and that there were several misstatements in the transcript, including the statement that Petitioner had previously sold cocaine. (Trial Tr. pp. 34, 38-39). Petitioner also testified that he had no idea if changes were made to the transcript but that obviously things could have been added. (Trial Tr. pp. 55-56).

Another key factor to demonstrate that the jury relied heavily on the government's transcript in its decision is the fact they requested to see the transcript during deliberation. The fact that they did not see it a second time does not change the fact that they asked to see it again. In fact, in *Robinson*, the Sixth Circuit noted the jury's reliance on the transcript prepared by the government made its use substantial and that "the practical effect of using an aid to comprehend unintelligible matter is that the aid becomes evidence." *Id.* at 878.

It is clear that a mandate needs to be established regarding the issue of use by a jury of a transcript prepared by one party to be read with a partially inaudible audio tape. According to precedent of the United States Court of Appeals for the Eighth Circuit and Sixth Circuit, safeguards must be utilized when allowing use of a transcript prepared by one party to be read with a partially inaudible audio tape. These safeguards include stipulation of both parties to the accuracy of a disputed transcript, including verification from qualified and unbiased source(s), or allowing both parties to submit a transcript to the jury. It is clear that any other alternative would contradict the policies behind the precedents of the Eighth and Sixth Circuit cases. Therefore, Petitioner was denied any of the above safeguards and accordingly, his Due Process Right to a fair trial by an impartial jury was violated.

III.

A. In *United States v. Pollard*, 77 S.Ct. 481, 484 (1957), this Court issued a Writ of Certiorari based on the Petitioner's

argument that the Court imposing his sentence ignored the proper standards of criminal law administration when rendering same. Similarly, Petitioner Britton asserts that the United States District Court, Eastern Division of Missouri, ignored the proper standards of criminal law administration when it sentenced him.

Specifically, Petitioner Britton asserts that the United States District Court, Eastern District of Missouri, ignored the proper standards of criminal law administration by enhancing his sentence two (2) levels pursuant to USSG Section 2D1.1 USSG Section 2D1.1 allows for a two (2) level enhancement when the defendant possesses and/or uses a firearm in the commission of the offense. To properly apply this enhancement the Court must determine that two (2) elements are present:

1. the weapon was present; and

2 it was not clearly improbable that the weapon had a nexus to the criminal activity. See Note three (3) of USSG Section 2D1.1(b)(1) as reflected in Appendix C; *United States v. Vasquez,* 874 F.2d 250, 251 (5th Cir. 1989) and *United States v. Bost,* 968 F.2d 729 (8th Cir. 1992).

In Petitioner's case, the weapon was found eight (8) months after the commission of the offense in his gunshop where Petitioner did business as a licensed firearm dealer. Therefore, the above elements were not met.

The United States District Court, Eastern District of Missouri, revealed its willingness to ignore the first element listed above when it stated "I don't think that's important," in response to the undisputed evidence that no officer at the scene of the commission of the offense saw a firearm. (Sentencing Tr. p. 12) Accordingly, The Court ignored the necessity of the existence of this key element when it enhanced Petitioner's sentence by two (2) levels.

Further, it is clearly improbable that his firearm had a nexus to the criminal activity since it was present in the gun shop of Petitioner who would sell and/or buy such firearms in his normal course of business. The United States District Court, Eastern District of Missouri, stated at the sentencing the following:

> What's crucial is why it (the firearm) was there and what relation, if any, it had to drug trafficking. . . . And this firearm was found some nine months later — eight months later. And I am just wondering how they can be connected, if at all. (Sentencing Tr. p. 12).

This statement indicated the Court did not decide it was not clearly improbable that the weapon had a nexus to the criminal activity.

For the foregoing reasons, the United States District Court, Eastern District of Missouri, ignored the proper standards when it enhanced Petitioner's sentence by two (2) levels. This Court's intervention is warranted to define the scope of USSG Section 2D1.1 since the Court of Appeals upheld the United States District Court, Eastern District of Missouri's improper administration of criminal law by enhancing Petitioner's sentence by two (2) levels pursuant to USSG section 2D1.1.

B. The Court of Appeals' opinion regarding Petitioner Britton contradicts precedent regarding the application of USSG Section 2D1.1. The Fifth Circuit recently vacated and remanded a lower court's application of USSG section 2D1.1 when a loaded firearm was discovered during the search of the defendant's bedroom after his arrest, several miles from the scene of the commission of the offense. See *United States v. Vasquez,* 874 F.2d 250 (5th Cir. 1989). The *Vasquez* Court held that to enhance the defendant's sentence pursuant to USSG Section 2D1.1 in this situation was a "strained interpretation" of the requirement that the defendant possess the weapon during the commission of the crime.

Likewise, it is a "strained interpretation" to conclude Petitioner Britton possessed a firearm at the time of an offense when said firearm was found at his firearm dealership eight months after the commission of the crime.

In another case, the Fifth Circuit emphasized the necessity of connecting the crime and weapon temporally and spatially. See *United States v. Suarez,* 911 F.2d 1016 (5th Cir. 1990). In this case, the Court upheld enhancement of a defendant's sentence when the weapon was found under the mattress based on the fact that the weapon could have been loaded and fired within one and a half to two seconds. This decision was based on previous cases which involved weapons connected temporally and spatially to the commission of the offense.

In contrast, in Petitioner Britton's case, no weapons were seen or discovered at the scence of the commission of the crime. In fact, no weapon was discovered until eight (8) months after defendant had been arrested. There is no temporal or spatial relationship between Petitioner's britton's commission of the underlying offense of knowingly and intentionally distributing a quantity of Cocaine, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(c) on January 21, 1994 and the discovery of a firearm at his gun shop eight (8) months later.

Two recent Eighth Circuit cases also reveal that the Court of Appeals failed to follow its own precedent. In the case of *United States v. Bost,* 968 F.2d 729 (8th Cir. 1992), the Eighth Circuit vacated and remanded a case similar to Petitioner Britton's. The *Bost* Court held that the discovery of a weapon two and one-half months after the commission of the offense did not allow for enhancement of the defendant's sentence pursuant to USSG Section 2D1.1 because such a lapse of time indicated no temporal or spatial relationship between the weapon and the crime. In Petitioner Britton's case, there is an even longer lapse of time, eight (8) months; therefore, no temporal or spatial relationship

existed between Petitioner Britton's commission of the underlying offense and the weapon found eight (8) months later at his gun shop. Further, Petitioner Britton is a licensed firearm dealer and by necessity, had weapons in his store. Accordingly, there is no temporal and spatial relationship between Petitioner Britton's commission of his crime and the discovery of a weapon in his gun shop eight (8) months later.

Another recent Eighth Circuit decision vacated and remanded a case where the defendant's sentence had been enhanced under USSG Section 2D1.1 when weapons were found almost a year after commission of the offense. See *United States v. Matthews*, 5 F.3d 1161 (8th Cir. 1993). Relying on *United States v. Pou*, 953 F.2d 363 (8th Cir. 1992), the *Matthews* Court held that "a firearm possessed by a convicted drug offender must be connected with the drug offense of conviction before its possession can be used to enhance his sentence and the government bears the burden of establishing this relationship." *Id.* at 1166. See *United States v. Dinges*, 917 F.2d 1133, 1135 (8th Cir. 1990) and *United States v. Williams*, 905 F.2d 217, 218 (8th Cir. 1990).

According to the *Matthews* precedent, the government failed to show the temporal and spatial relationship between Petitioner Britton's commission of the crime and discovery of a firearm eight (8) months later. In the facts of Petitioner Britton's case, the government has offered no evidence that any weapons were present or any evidence to show a nexus between the non-present weapon and Petitioners Britton's offense.

C. Clearly, lower courts have not been provided with a mandate of this Court regarding the application and scope of USSG Section 2D1.1(b)(1). Accordingly, the parameters of USSG Section 2D1.1 change with each opinion of the Appellate Circuits of the United States. This lack of boundary regarding the application of USSG Section 2D1.1 has created the opportunity for Defendants to receive harsher sentences regardless of any connection between committing an offense and possessing,

utilizing, exercising control over or subsequently having a weapon to do so. In fact, Petitioner Britton's case allows law enforcement officials to find any weapon at any time at any place the defendant works, resides or stays and punish defendant for same when no culpability exists.

The above scenario defeats the purpose of USSG Section 2D1.1; to punish criminals who use weapons to commit an offense or have one nearby to do same. Presently, this sentencing guideline is being used to punish defendants who do not use such weapons to commit their offenses. This application is beyond the policy of the guideline which mandates an increase of a defendant's sentence when weapons are present and have a connection to the offense. Petitioner herein respectfully requests this Court grant Petitioner's Petition for Writ of Certiorari so that a clear mandate for the application of sentencing guideline USSG Section 2D1.1 be established.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

Respectfully submitted,

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Attorney for Petitioner

Dated:

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

UNITED *STATES OF AMERICA*

V.

Richard Britton
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After 11/1/87)

Case Number: 4:94CR276 CEJ

Lawrence Willbrand
Defendant's Attorney

[Filed: March 06, 1995]

THE DEFENDANT:

[ ] *Pleaded guilty to count(s)*

[x] *Was found guilty on count(s)* I *after a plea of not guilty.*

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:841(a)(1) & 841(b)(1)(c)	Distribution of Cocaine	1/21/94	I

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] *The defendant has been found not guilty on count(s)____ _____, and is discharged as to such count(s).*

[ ] *Count(s)_____ (is)(are) dismissed on the motion of the United States.*

[x] *It is ordered that the defendant shall pay to the United States a special assessment of* $ 50.00, *for count(s)_____ _____, which shall be due* [x] *immediately* [ ] *as follows:*

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. No.: 490-60-5022

Defendant's Date of Birth: 4/23/53

Defendant's mailing address:

1226 North 3rd Street
DeSoto, Missouri 63020

Defendant's resident address:

Same as above

March 6, 1995
Date of Imposition of Sentence

/s/ Carol E. Jackson
Signature of Judicial Officer

Carol E. Jackson
U.S. District Judge
Name and Title of Judicial Officer

March 6, 1995
Date

Defendant: Richard Britton
Case Number: 4:94CR276 CEJ

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of:
97 months

[ ] *The Court makes the following recommendations to the Bureau of Prisons:*

[x] *The defendant is remanded to the custody of the United States Marshal.*

[ ] *The defendant shall surrender to the United States Marshal for this district,*

a.m.
[ ] *at _____ p.m. on _____.*

[ ] *as notified by the Marshal.*

[ ] *The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,*

[ ] *before 2:00 p.m. on _____.*

[ ] *as notified by the United States Marshal.*

[ ] *as notified by the Probation Office.*

RETURN

*I have executed this Judgment as follows:*_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

*By*_____
Deputy Marshal

Defendant: Richard Britton
Case Number: 4:94CR276 CEJ

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

3 years

While on supervised release, the defendant shall not commit another Federal, state or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this Judgment ;imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[x] *The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.*

[ ] *The defendant shall pay any fines that remain at the commencement of the term of supervised release.*

[x] *The defendant shall participate in a program of testing and treatment for substance abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.*

1) The defendant shall participate in a program of mental health, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment, the defendant shall not commit another Federal, state or local crime. In addition:

1) *the defendant shall not leave the judicial district without permission of the court or probation officer;*

2) *the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report with the first five day of each month;*

3) *the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;*

4) *the defendant shall support his or her dependents and meet other family responsibilities;*

5) *the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;*

6) *the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;*

7) *the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;*

8) *the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;*

9) *the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;*

10) *the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;*

11) *the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;*

12) *the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency with the permission of the court;*

13) *as directed by the probation officer, the defendant shall notify third party risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm the defendant's compliance with such notification requirement;*

14) *the defendant shall not possess a firearm or destructive device.*

Defendant: Richard Britton
Case Number: 4:94CR276 CEJ

STATEMENT OF REASONS

[x] *The Court adopts the factual findings in the presentence report as to the applicable guideline factors,*

OR

[ ] *The Court adopts the factual findings in the presentence report as to the applicable guideline factors except:*
(See attachments if necessary)

Guideline Range as Determined by the Court:

*Total Offense Level:*_____

*Criminal History Category:*_____

Imprisonment Range: _____ *to* _____ *months*

Supervised Release Range: _____ *to* _____*years*

Fine Range: $_____ *to* $_____
*(plus $1,492.00 cost of imprisonment and $115.30 cost of supervision per month)*_____

$_____*Restitution* $_____*Special Assessment*

[x] *Fine waived or imposed below guideline range because of inability to pay.*

---

[x] *Sentence Imposed is within the guideline range, that range does not exceed 24 month, and the court finds no reason to depart from the sentence called for by application of the guidelines.*

[ ] *Because the width of the guideline range exceeds 24 months, the reason for selecting this particular point within the range is:*

[ ] *The Court departs from the Guideline (See attachments if necessary)*

[ ] *upon motion of the government, as a result of defendant's substantial assistance.*

[ ] *for the following reason(s):*

[ ] *Court orders transcript of Statement of Reasons to be attached.*

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1598

United States of America,
Appellee,

v.

Richard W. Britton,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: June 13, 1995
Filed: October 19, 1995

Before BOWMAN, Circuit Judge, HENLEY, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

HENLEY, Senior Circuit Judge

Richard W. Britton appeals from a judgment of the district court[1] entered upon a conviction for distributing cocaine in violation of 21 U.S.C. § 841(a)(1) and a 97-month sentence. We affirm.

Britton and others were the targets of a narcotics investigation. On January 21, 1994, undercover police officer Jana Malady and an informant, who was equipped with a recording device, went to Britton's "quick shop," where Britton sold Malady cocaine. Because the investigation was ongoing, Britton was not arrested at that time, but was eventually arrested at the quick shop on

---

[1] The Honorable Carol E. Jackson, United States District Judge for the Eastern District of Missouri.

September 29, 1994. During subsequent searches of the shop and Britton's home, officers seized a pistol and marijuana from the office where Britton sold Malady the cocaine and drugs from the home. While in custody, Britton admitted he was a drug dealer and had used the pistol during "all of the transactions."

At trial, in addition to Malady's testimony and the testimony of other agents, the government introduced an audio recording of the January 21 transaction and provided the jury with a transcript of the recording, which Malady had prepared.

On appeal, Britton first argues that the district court erred in allowing a government witness to instruct the jury on the use of audio headphones. He relies on *Remmer v. United States,* 347 U.S. 227, 229 (1954), in which the Supreme Court held that "[i]n a criminal case, any private communication . . . with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of . . . the directions of the court made during trial, with full knowledge of the parties." Britton also relies on *Turner v. Louisiana,* 379 U.S. 466, 473 (1965), in which the Supreme Court held that prejudice was inherent in the "continuous and intimate association" between two sheriff deputies who were key prosecution witnesses and custodians of the sequestered jurors. Britton's reliance on these cases is totally misplaced. Unlike *Turner,* in this case the agent was not a key witness and his contact with the jury was brief. Unlike *Remmer,* the agent's contact with the jury was not "private" but was made in open court and with Britton's consent. There fore, we find no error, much less plain error.

We also reject Britton's argument that the district court erred in permitting the jury to use a transcript of the tape recording prepared by Malady. Britton asserts that the court failed to follow *United States v. McMillan,* 508 F.2d 101 (8th Cir. 1974), *cert. denied,* 421 U.S. 916 (1975). We disagree. In *McMillan,* the court allowed a government witness to read government-

prepared transcripts of tape recordings to the jury. This court did not find reversible error, noting :it may be appropriate, in the sound discretion of the trial judge, to furnish the jurors with copies of a transcript to assist them in listening to the tapes." *Id.* at 105. However, this court cautioned that "[t]ranscripts should not ordinarily be read to the jury[,] [be] given independent weight[,] [or] be admitted into evidence." *Id.* at 105-06. In addition, we indicated that the district court should instruct jurors that they should "rely on what they hear rather than on what they read." *Id.* at 106. Here, the court followed *McMillan*; the transcript was not admitted into evidence and the court instructed the jurors that if they "perceived any variation between the tape . . . and what is written on the transcript, you are to be guided solely by the tape and not the written transcript." Although Britton suggest that the transcript was inaccurate, "[n]either in his brief nor at oral argument, [] has he pointed to any specific inaccuracy, material or otherwise." *United States v. Riascos*, 944 F.2d 442, 444 (8th Cir. 1991). Therefore, "[w]ithout specific allegations of error to guide us, we must assume that the transcripts were accurate representations of the tapes." *Id.* Moreover, at oral argument, Britton conceded that the government had provided him with the tape recordings before trial and that he had an opportunity to prepare his own transcript. *Cf. United States v. Nicholson*, 815 F.2d 61, 63 (8th Cir. 1987) (no reversible error in admission of tape recording with substantial inaudible portions because "parties had the opportunity to argue to the jury their versions of what was contained on the inaudible portions").

Last, Britton challenges the district court's two-level enhancement of his sentence for possession of a firearm during commission of the offense under U.S.S.G. § 2D1.1(b)(1). Note 3 to the section provides that the enhancement "should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected to the offense." The presentence report (PSR) recommended the enhancement based on the sei-

zure of the pistol from the quick shop at the time of Britton's arrest in September 1994. Britton objected to the enhancement. At the sentencing hearing, an officer reiterated trial testimony that while in custody Britton admitted that he had used the pistol "during all of his transactions" because of the amount of money that was involved. Britton did not dispute the testimony and the court overruled his objection, finding that it was not clearly improbable that the pistol was connected with the offense.

In the district court, the government must prove by a preponderance of the evidence that it was not clearly improbable that the weapon was connected to the charged offense. *United States v. Shields,* 44 F.3d 673, 674 (8th Cir. 1995). On appeal, "[w]e will not reverse the [d]istrict [c]ourt's conclusion that the weapon was connected to the offense unless it is clearly erroneous." *United States v. Baker,* 64 F.3d 439, 441 (8th Cir. 1995).

Britton argues that the district court erroneously applied the enhancement because the government failed to prove the required nexus between the cocaine sale and the pistol, noting the pistol was seized eight months after the sale. He relies on *United States v. Bost,* 968 F.2d 729 (8th Cir. 1992), in which this court held that a district court had erred in applying the firearm enhancement where weapons were seized two and one-half months after commission of the charged acts. In *Bost,* we noted that cases had upheld the enhancement even though there were lapses in time between seizure of firearms and commission of offenses if the government established a nexus between the firearms and the offense. *Id.* at 732-33, citing *e.g., United States v. Koonce,* 884 F.2d 349, 351, 354 (8th Cir. 1989) (nexus between weapon seized eight days after drug offense and offense because drugs and letter regarding defendant's drug deals were seized with weapon). However, in *Bost* we held that the enhancement was inapplicable because "[t]he government provided no evidence that the [seized] weapons . . . were present when [defendant] committed the charged offense or that he

possessed them." 968 F.2d at 733. In particular, we noted no evidence suggesting that weapons were present during the drug deals and found it "significant that when the search warrants were executed . . . only weapons were found — not drugs." *Id.* Britton also notes the recent case of *United States v. Shields,* 44 F.3d at 674-75, in which we also held that a firearm enhancement was improper based on a seizure of a weapon thirty-seven days after the last known drug transaction "[b]ecause the government presented no evidence regarding the presence of the weapons and their nexus to the drug crimes." Again, we found it significant that "no additional drugs were discovered at the time of the seizure." *Id.* at 574 n.1.

Although, as Britton suggests, the length of time between the seizure of a firearm and a charged offense may be relevant in determining whether there is a nexus between a firearm and the offense, it is not controlling. *See United States v. Matthews,* 5 F.3d 1161, 1155 (8th Cir. 1993) (where nexus between weapon seized one year after offense and offense was "not readily apparent," we remanded for factual findings regarding nexus).[2] In the circumstances of this case, we do not believe that the eight-month lapse between the seizure of the pistol and the cocaine sale makes a nexus between the weapon and the sale clearly improbable. As a government witness explained at trial, Britton was not arrested after the sale because the narcotics investigation continued. More importantly, unlike *Bost* and *Shields,* in this case the government introduced evidence establishing a nexus between the pistol and the cocaine sale. First, the pistol was found along with drugs in Britton's office — the site of the cocaine sale — and following his arrest Britton admitted that he was a drug dealer and had used the pistol during "all his transactions" because he frequently carried a large amount of money. *See*

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[2] On remand, the government conceded there was no evidence in support of the firearm enhancement. *United States v. Matthews,* 29 F.3d 462, 463 (8th Cir. 1994).

United States v. Baker, 64 F.3d at 441 (defendant's admissions supported firearm enhancement). We disagree with Britton that the district court should not have relied on his statement that he used the pistol for "all of his transactions" because he may have been referring to legitimate business transactions.[3] Given that the statement was made after his arrest for a drug offense and while in custody he also admitted being a drug dealer, the district court properly relied on the statement as evidence that it was not clearly improbable that the pistol was connected to the cocaine sale. Therefore, we hold that the district court did not err in applying the firearm enhancement.

Accordingly, the district court's judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[3] Britton who was a licensed firearm dealer, also argues that application of section 2D1.1(b)(1) to a licensed firearm dealer is discriminatory on its face and a "perversion" of the purpose of the guideline. This argument is clearly without merit. As with all defendants, the government must prove a nexus between a firearm and a firearm dealer's illegal conduct.

APPENDIX C

PART D — OFFENSES INVOLVING DRUGS

1. UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, TRAFFICKING, OR POSSESSION; CONTINUING CRIMINAL ENTERPRISE

§2D1.1 ***Unlawful Manufacturing, importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy***

(a) Base Offense Level (Apply the greatest):'

(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. IF the resulting offense level is less than level **26**, increase to level **26.**

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(d) Cross Reference

(1) IF a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).

* * *

Commentary

Statutory Provisions: *21 U.S.C. §§ 841(a), (b)(1)-(3), 960(a), (b). For additional statutory provision(s), see Appendix A (Statutory Index).*

Application Notes:

* * *

3. Definitions of "firearm" and "dangerous weapon" are found in the Commentary to §1B1.1 (Application Instruction). The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon

was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that are referenced to §2D1.1; see §§2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), 2D1.12(b)(1), and 2D2.1(b)(1).

* * *

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:94-CR-276-CEJ

UNITED STATES OF AMERICA,
PLAINTIFF,

vs.

RICHARD W. BRITTON,
DEFENDANT.

TRANSCRIPT OF SENTENCING

BEFORE THE HONORABLE CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

MARCH 6, 1995

REPORTED BY: GARY BOND
OFFICIAL U.S. COURT REPORTER
812 U.S. COURTHOUSE
1114 MARKET STREET
SAINT LOUIS, MISSOURI 63101
314/421-5502

APPEARANCES:

For the plaintiff:

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By: Richard L. Poehling, Esq.
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For the defendant:

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INDEX

PLAINTIFF'S WITNESS:	PAGE:
SCOTT REED:	
Direct Examination by Mr. Poehling	22
Cross-Examination by Mr. Willbrand	36
Redirect Examination by Mr. Poehling	37
Recross-Examination by Mr. Willbrand	37
JANA MALADY:	
Direct Examination by Mr. Poehling	38
Cross-Examination by Mr. Willbrand	40
Redirect Examination by Mr. Poehling	41

SAINT LOUIS, MISSOURI; MARCH 6, 1995

10:04 a.m.

[4]

THE COURT: United States vs. Richard Britton. Good morning, Mr. Willbrand —

MR. WILLBRAND: Good morning.

THE COURT: and Mr. Poehling. Mr. Britton, have you had enough time to read the presentence report and discuss it with your lawyer?

THE DEFENDANT: My lawyer and I have discussed nothing, except what we did this morning. But I've read it and everything.

THE COURT. Do you want some time to talk to him?

THE DEFENDANT: No, no. Not at all.

THE COURT: All right. And Mr. Willbrand, I know that you've received the report, because I've received your objections.

MR. WILLBRAND: Yes, Your Honor, That's correct.

THE COURT: I'll take those up in a moment. Actually, you filed objections on behalf of Mr. Britton, and Mr. Britton filed some objections on his own.

MR. WILLBRAND: I incorporated his objections with mine, Judge.

[5]

THE COURT: I have received, in addition to the presentence report, a number of letters and petitions in support of you, Mr. Britton. There are so many people who have written to me, that I think it would probably take the better part of the morning to

read off these names. I will say this: I did read each and every letter that I received as well as all of the — some of them came with attachment of newspaper clippings and other articles concerning you and your family. And all the letters that I received were favorable. I mention that because, occasionally, when a defendant is before me for sentencing, I'll get a letter from somebody who says, "Throw the book at him." But I didn't get that in your case. And I don't know how big Jefferson County is, but I think half of Jefferson County at least wrote a letter in support of you. I want you to know that I did receive and read all of these, and I will take them into account in sentencing.

THE DEFENDANT: Okay.

THE COURT: All right. Why don't we proceed with the objections.

MR. WILLBRAND: Your Honor, I believe that there may be some exaggeration involved in the allegations contained in the presentence report. For example, he's a businessman. In fact, as you know, he's a well-liked and [6] respected businessman in Jefferson County. His business and you know what kind of business he has, with the gas station and the convenience store and all those — and all those other assorted businesses. He was held up by a robber with a gun, and he decided, well, from now on, that he's going to have a gun. And I think most business people do have guns. At least many of them have guns, for just that sort of thing. He did have a gun, and I notice in here that they say, well, he had a gun in his possession. But, as a businessman, this is inevitable, I think, if you're going to resolve a problem with protection by having a gun. Secondly —

THE COURT: Let me interrupt you, Mr. Willbrand.

MR. WILLBRAND: Yes, ma'am.

THE COURT: Some of these things, I imagine, you've raised in your written objections.

MR. WILLBRAND: Yes, judge.

THE COURT: You'll have an opportunity to make whatever argument you want to and to present whatever evidence you have with respect to all of these objections. I sort of like to take them one at a time, so that we get through them in an orderly fashion so that we don't overlook something.

The first objection is directed to paragraph four of the report in which several, in particular, four drug [7] sales are alleged to have occurred and engaged in by the defendant, other than the sale of conviction. The defendant objects to this allegation. Mr. Poehling, do you have any response to the defendant's objection?

MR. POEHLING: We stand by the information. As a result of our investigation, this statement is totally accurate that the probation office has prepared. The Court may recall one of these prior sales was talked about by the testimony of the undercover officer, Miss Malady, when she testified. It's referred to in the taped conversation. That's the particular incident on January 4th, where there was reference when Mr. Britton tells her, "You know, you bought an ounce for 16," when they're talking about the arriving at a price for the particular sale of the 21st, which was the subject matter. In addition to those other buys, I have available — and I am perfectly willing to put on the officer who was present doing surveillance when these buys occurred — he reviewed the buys. Those were all tape-recorded buys. He reviewed the tapes after the buys took place. He performed the requisite search of the informant before she went in, and he retrieved the drugs from her immediately upon her coming out. He did the field test, and he has the laboratory results. I am fully prepared to go forward with that if it's necessary.

[8]

THE COURT: In think it may be. I recall that there was some testimony regarding at least one other transaction regarding the

trial. Here we're talking about four and apparently the drugs involved. The purchase prices are pretty specific.

MR. POEHLING: I am not quite sure of the thrust of the objection as to whether or not they never [sic] occurred or whether or not they should be included as relevant conduct and I think that makes a difference as to my response. If that's the thrust of what Mr. Willbrand is saying, that they should not be lumped in as relevant conduct, then I'll address that. If he can give some guidance as to exactly what he's saying here.

THE COURT: I tell you my interpretation is I thought he was saying both, but you can speak for yourself, Mr. Willbrand.

MR. WILLBRAND: That's correct, Your Honor. That's exactly what I was going to say.

MR. POEHLING: Okay.

MR. WILLBRAND: I might point out on the January 4th incident, that was improperly volunteered by an officer of the law who knows better, and that was thrown in to prejudice the jury. It was not responsive to any question.

THE COURT: Why don't we hear some testimony on [9] that.

MR. POEHLING: That's fine.

THE COURT: Before you do that, I kind of want to move on to another matter for which there may be a need for some testimony, and that concerns the objection on paragraph five, which involves the discovery of this firearm that was found at the time of the defendant's arrest in September of 1994. There are basically a couple of objections here. One is the defendant is objecting to the statement in the report that the gun had been reported stolen.

MR. POEHLING: That's correct.

THE COURT: He denies that it was a stolen firearm. Second of all, the defendant objects to the inclusion or the consideration of that firearm at all in relation to the offense for which he was convicted.

MR. WILLBRAND: In connection with that, Your Honor, I have a permit — a firearm permit — that allows him permission to have that gun. And it sets out the serial number, and he had also asked an officer of the law in Jefferson County to check that serial number to see if it was okay, and he did. And he was told by the officer of the law that it was a perfectly proper weapon. It was not stolen at all.

MR. POEHLING: In response to the knowledge — I **[10]** am seeing this for the first time — but I have no problems with what Mr. Willbrand represents it to be.

THE COURT: I don't know that it was material, whether the gun was stolen or whether Mr. Britton knew it was stolen or if it wasn't stolen, because that didn't have any impact on the offense level. What did have an impact was the fact that there was a firearm at the time — stolen or legitimate. That's the two-point increase for that.

MR. WILLBRAND: Could Mr. Britton say something in that regard, Your Honor?

THE DEFENDANT: I have some papers that I took from the transcription of the trial. Was asked if there was a gun involved, and the witness said "No." If I can, I can show it to you.

THE COURT: That's fine. Yes.

MR. POEHLING: As I understand this particular point, while Mr. Britton is getting that transcript, I don't think factually it's disputed that there was a gun present. It's just a question of Mr. Willbrand's objecting as to whether or not it should be included.

MR. WILLBRAND: He has a gun shop. He sells guns, and it depends on what area we're talking about. .

THE COURT: Paragraph five, it says that gun, which was a nine millimeter semiautomatic pistol, was [11] found behind the counter of the store.

MR. POEHLING: I don't know that that's disputed. I'll stand corrected, Mr. Willbrand. I thought what he was trying to indicate in his opening statement was that every operator in a business in Jefferson County has a firearm. So I don't know if we're disputing that it was there or not.

MR. WILLBRAND: He states that on page 144 of Book Two, Your Honor, it states:

"Q. Was there a weapon present? Is that it? And then there's an answer.

THE DEFENDANT: Do you have a copy of the transcription?

MR. WILLBRAND: Page 144, line 13.

THE DEFENDANT: Book Two.

MR. POEHLING: That's in reference to the officer's report, which has a section on it, Your Honor, where the officers are supposed to indicate whether or not there was a weapon present or not. And obviously the officers can only do that if they see a weapon. I'll admit that. There's no question about that.

MR. WILLBRAND: Nor was there any evidence that the undercover officer saw a weapon.

MR. POEHLING: I agree with that. That's totally [12] correct.

THE COURT: I don't think that's important. What is important here is that there is the allegation that there was a

weapon there! And what's crucial is why it was there and what relation, if any, it had to drug trafficking. And I'm not sure how to answer that question, because here, the last drug sale was in January of 1994. And this firearm was found some nine months later — eight months later. And I am just wondering how they can be connected, if at all.

MR. POEHLING: My response to that would be obviously you're correct. It was not seized until approximately nine months after the incident. I would suggest to the Court it was connected by the defendant's own statement where he admitted to the officers that he always carries a gun involving all of his transactions. So that's what I submit to the Court as a justification for that.

MR. WILLBRAND: I think what he said was that carrying amounts of cash and money in connection with his business he would carry a gun in his briefcase.

THE COURT: I don't know what he said. I saw that reference in the report, but I don't know where that came from.

MR. POEHLING: The probation officer who prepared [13] that, my understanding is that he obtained that through the agent. He's here, and he can clarify that if there's some question as to where that statement came from.

THE COURT: I think there's a question in my mind at least on that.

MR. POEHLING: May I ask officer Miles Jones, who prepared the report?

THE COURT: Yes.

MR. POEHLING: Reference that particular statement.

OFFICER JONES: The interview with the U.S. Marshall's [sic] office?

MR. POEHLING: Yes. That' correct. Well, he's referring to the report of Trooper Reed, who is present in the courtroom here today. And although I am not going to take myself out of a role as an advocate and testify, it was an interview that was done down in the Marshal's Office that I happened to be present for. But the trooper is the one who was present, and he can address that question.

THE COURT: We'll get to him also. There were some other objections — and I am skipping ahead just a little bit, because I am trying to determine which things we made [sic] need to hear testimony on — but there were some objections to paragraphs six and seven of the report which **[14]** contain references to drugs and in particular marijuana and methamphetamine that were found during the search of the defendant's property. And of course these drugs were factored into the drug quantity calculation, which was used in part to determine the defendant's offense level. As I understand it — and I am not real sure about this — the defendant's objection or specific objection was that no cocaine or paraphernalia were found. That's not what the report says. The report doesn't talk about cocaine in those two paragraphs. It talks about drugs other than cocaine that were found. And I am not sure what your objection is.

MR. WILLBRAND: In connection with that, Your Honor, that issue was not raised during the trial. And we had a witness present subpoenaed to explain how that pipe got in the garage and that he did not know the contents of that pipe. We could explain to you what happened now if you would like.

THE DEFENDANT: Since it was never brought up, there was no sense in calling the witness.

MR. WILLBRAND: He can explain how that pipe got in the garage.

MR. POEHLING: Could I respond, judge? That was never brought up in trial because Mr. Willbrand sat in your office and

made a pretrial motion in limine — an oral **[15]** pretrial motion in limine — that the government not bring it up. I agreed, and that's the reason why it wasn't brought up, because he asked me not to.

THE DEFENDANT: Nobody asked me anything about it, and I'm the one on trial.

THE COURT: One person at a time please. Whether it was brought up at trial or not, this could still fall in the category of relevant conduct. It doesn't matter whether it was brought up at trial. I understand, Mr. Britton, you were not convicted of any offense involving marijuana or methamphetamine. But the guidelines permit the Court to consider matters other than the subject matter of the conviction in determining what the sentence is. And so that's how these issues have come up. Now all I need to know is whether the defendant is denying that there was marijuana found or that there was methamphetamine found.

MR. WILLBRAND: He's denying the knowledge of knowing what was in the canister.

THE DEFENDANT: I still don't know what was in the cannister [sic].

MR. WILLBRAND: He can explain that.

THE COURT: I don't want an explanation right now. All I want to know is that I want to get a clear understanding of what his objection is. If he's saying **[16]** that, "I didn't know that there was marijuana there" or "I didn't know that there was methamphetamine there," that's different than saying, "There wasn't marijuana there and there wasn't methamphetamine."

THE DEFENDANT: I know what it was.

MR. WILLBRAND: He knows what the officers allege.

THE DEFENDANT: I have a witness who I say was never called. I don't why [sic] Mr. Willbrand didn't bring this up in

court and didn't get this out of the way. But they didn't. I am not trying to hide anything.

THE COURT: You have a witness who will say that?

THE DEFENDANT: They found this pipe and gave it to me, and that's where the pipe came from.

THE COURT: All right. I mean, I don't think I need to hear testimony on that. Here's what I am going to do: as far as the objection to paragraphs six and seven are concerned, I am going to overrule those. I understand that the defendant's position is that he had no knowledge of these matters.

MR. WILLBRAND: That's correct, Your Honor.

THE COURT: All right.

MR. WILLBRAND: I might point out in that, in connection with that, he consented to a complete search of not only of his business but also his home, even though he [17] wasn't at home when they arrested him.

THE COURT: I understand that. Why don't we go ahead and hear the testimony on the two issues.

MR. WILLBRAND: There is the issue of whether he cooperated or not, judge. Would you want to go into that now?

THE COURT: Again, that's not material, as far as I'm concerned. You know, I don't know what I want to say about that.

THE DEFENDANT: Your Honor —

THE COURT: I think that the report reflects, as you mentioned before, his consent to the search. So that certainly is suggestive of cooperation.

MR. WILLBRAND: They asked about where he obtained drugs, and I think he said that he did use marijuana and that he obtained it from the Schrums (phonetic).

(Discussion held off the record.)

MR. WILLBRAND: He maintains that he has been cooperative.

THE DEFENDANT: They say I wasn't cooperative Your Honor, but then they say that I told them that I was a drug dealer; that I had a gun; that I had this. If that's not cooperation, I don't know what is. If I said this. They said that I did, but then the next sentence they say [18] I was not cooperative. They're saying one thing and saying another thing next. And I wrote all that stuff down.

THE COURT: I have all of that. As I said before, I am not sure how the agents want to characterize what you did or did not do as being cooperative or uncooperative and how I would characterize it based on what I have in the reports and other information that you have provided. It is not a point that is going to have any impact on the guideline range. If you want to argue that in mitigation, that's fine. I think it would be appropriate in that context but as far as the guideline range itself is concerned, it's not going to be affected one way or the other by the defendant's cooperation or lack of cooperation.

THE DEFENDANT: Your Honor, they're saying that these other drugs were sold to me; that I sold these other drugs. This is just saying that in one thing they're saying one thing, and in another thing they're saying something else. I mean, how many times can they talk like that? I can say one thing, and you would say I was lying and would be committing perjury. But your questioning attorney tells you one thing and is lying, and nothing happens to him. I don't understand how that works. If it's his word against mine, sure.

MR. WILLBRAND: The judge has explained that [19] won't make any difference in the sentencing.

THE DEFENDANT: It makes a difference when they say they sold me these drugs or not. That's the difference it's making: their testimony.

THE COURT: To the extent that it may have some bearing on the credibility of any witness who may be testifying, you know, I'll consider that when the testimony is offered. So I will overrule the defendant's objection paragraph 11 of the report. The defendant has another objection, which I don't believe is going to require any testimony that is relating to paragraph 13 of the report which pertained to the defendant's obstruction of justice. The objection, I take it, is directed to both paragraphs 13 and 20. In paragraph 20, there was a two-point increase assessed for obstruction of justice. Mr. Willbrand, I don't know if you have anything more you want to say on this beyond what's in your written objection.

MR. WILLBRAND: It seems a little inconsistent that if he defends himself, he's obstructing justice. And at the same time if he pleads guilty, he gets credit for that. It seems to me like a double-jointed penalty to defend yourself and also be penalized because you didn't plead guilty.

THE COURT: I don't think that's the intention. [20] I don't think that's what in effect has been done here. There has been no penalty assessed by reason of the fact that Mr. Britton exercised his right to go to trial and to defend the charges and to require the government to prove the case against him. The guidelines don't permit any penalty for a defendant exercising his right in that fashion, and I have not viewed this two-point assessment as a penalty for the fact that he did go to trial and sought to defend himself. This assessment of two points related to some particular testimony that Mr. Britton gave during the trial, which was sharply contradicted evidence that came out after the trial regard-

ing his compliance with the pretrial release condition. In particular, Mr. Britton sat in the witness box and testified that he had not used drugs since the time of his arrest.

THE DEFENDANT: I still say that, Your Honor..

THE COURT: Mr. Britton please don't interrupt me. He gave testimony that he had ceased using drugs since his arrest; however, there were reports which he either acknowledged or certainly did not dispute of urine specimens taken from him since his arrest that tested positive for the presence of controlled substances.

MR. WILLBRAND: Could he attempt to explain that, Your Honor?

THE COURT: No, this is not the time to explain **[21]** it. That is why that obstruction of justice was made. It had nothing to do with the fact that Mr. Britton tried to defend himself in court. It had to do with his honesty in defending himself. And we talked about this at the time the request was made that he be remanded to custody. And we talked about whether he would be remanded or whether he would remain free pending sentencing. And I made it clear at that time that in making the decision that he would be remanded to custody I took into account the fact that I believe that he did not honestly testify about his use of drugs during the trial; that is, following his arrest. So that matter, I believe, has already been resolved. And I will overrule the defendant's objection to paragraph 13 of the report. There is also an objection that pertains to some financial information contained in the presentence report. You know, I am going to overrule that objection as moot. I'll just tell you now: it's not the Court's intention to impose a fine in this case. I don't believe that Mr. Britton's financial situation, although it looks pretty good now, it may not be if he is incarcerated.

MR. WILLBRAND: Thank you, judge.

THE COURT: I don't believe that he would have a means to pay a fine.

MR. WILLBRAND: Thank you, judge.

THE COURT: That will be denied as moot. All [22] right. Why don't we go ahead with the testimony relating to the other drug sales and the firearm. You all can have a seat.

DWAYNE SCOTT REED,

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (BY MR. POEHLING) state your name, please.

A My name is Dwayne Scott Reed.

Q Are you a trooper for the Missouri State Highway Patrol?

A I am.

Q Among your other duties, do you investigate violations of the Missouri law regarding drug traffic?

A I do..

Q Did you have occasion to initiate an investigation around September of 1993 concerning a methamphetamine drug operation?

A Yes.

Q In the course of the first part of that investigation, did you assume an undercover role?

A I did.

Q And basically, did you represent someone who was interested in the purchasing of quantities of drugs?

A Yes.

[23]

Q And in connection with your investigation, did you make a series of purchases from an individual named Haggert (phonetic)?

A Yes, I did.

Q And after you made those purchases from a man named Haggert, did you have occasion on September the 28th of 1993 to go to the store that is owned and operated by Richard Britton?

A I did.

Q When you went to the store on that occasion, where you still in an undercover role?

A Yes.

Q When you went to the store on that occasion, did you speak with Mr. Britton about obtaining some methamphetamine from him?

A I'd have to see the reports, sir. I was there a couple of different times. I spoke to him both times. I spoke to him both times.

Q The day that I'm day referring to specifically —

MR. WILLBRAND: excuse me, Your Honor, I would object. If the officer says he'd have to see the report, then I think he can't go any further without seeing the report.

THE COURT: I think that's what Mr. Poehling is looking for right now.

[24]

Q (BY MR. POEHLING) Officer, did you prepare a report of the incident?

A Yes.

Q Did you review the report when you prepared it?

A Yes.

Q Was it an accurate recollection at the time that you prepared the report of what took place?

A Yes.

Q Would your recollection be refreshed if you were allowed to review the report?

A Yes.

MR. WILLBRAND: Your Honor, may I interject an objection at this time?

THE COURT: On what grounds

MR. WILLBRAND: On the grounds that this report would not refresh his recollection if it's not based on his actual knowledge. If this is just based on hearsay, than I think that the report cannot refresh his recollection. It's got to be based on his actual knowledge, and I object to anything that's not based on his actual knowledge.

THE COURT: The objection is overruled.

Q (BY MR. POEHLING) If you could just scan that report, trooper, and then let us know if it refreshes your recollection?

[25]

A This is the report on Haggert.

Q What I am referring to is with Mr. Britton. What one did I give you? I'm sorry. I gave you the 15th. I apologize. I should have given you the 28th. I apologize. Having read that report, does it refresh your recollection, Trooper Reed?

A Yes. It's on the 28th that we're talking about?

MR. POEHLING: Mr. Willbrand, would you like to look at the report? Thank you.

MR. WILLBRAND: Your Honor, I think that the report itself shows that it's based on hearsay from Mr. Haggart or Hoggart or whatever his name is. And the report itself he only knows what Haggert told him..

MR. POEHLING: All I intend to elicit from this witness is the statements that were made to him by Mr. Britton in that meeting. That's all. I am not going to ask him what Mr. Haggert told him.

THE COURT: Go ahead. Proceed.

Q (BY MR. POEHLING) Trooper Reed, did you have occasion then to meet Mr. Britton while you were inside of the store on September the 28th of 1993?

A Yes.

Q And your purpose in going in there, was it to buy some drugs from Mr. Britton if possible?

A Yes.

[26]

Q You did not buy drugs — is that correct —

A No, I did not.

Q — from Mr. Britton on that day?

A No, I did not.

Q In the course of speaking with Mr. Britton, did he make some statements to you regarding being the source of supply for Mr. Haggert?

A Not to me on the 28th. No.

Q I'm sorry. On a different day?

A Yes.

Q Maybe I had my days fouled up. Did he make such an admission to you?

A It was on the 30th.

Q On the 30th. I apologize. On the 30th when you went in there as an undercover officer?

A Yes.

Q Okay. After you got that information, you did not buy any drugs from Mr. Britton on that day; did you?

A No, I did not.

Q Did you continue your investigation through the use of informants?

A Yes.

Q I am going to move you to October the 7th of 1993. Did you have occasion to utilize a confidential informant to purchase drugs from Mr. Britton?

[27]

A Yes.

Q And where did that —

THE COURT: Excuse me just a moment. What was the date again?

MR. POEHLING: October 7th, Your Honor. I believe that was the first day that we're talking about in additional sales.

Q (BY MR. POEHLING) Where did that take place?

THE COURT: Mr. Willbrand, is there a particular reason that you're standing there?

MR. WILLBRAND: At the same time, I'm reading, still reading, this rather lengthy statement.

MR. POEHLING: Lengthy? It's a one-page —

MR. WILLBRAND: It's small type, and I was still reading it, judge.

MR. POEHLING: You're welcome to take it back with you if you want.

MR. WILLBRAND: Thank you.

Q (BY MR. POEHLING) On October 7th, where did the sale take place?

A At the Britton's One Stop Convenience Store there in Jefferson County.

Q Were you present there in the area of the sale?

A Yes.

Q What was your role?

[28]

A I was in a surveillance role.

Q Did the informant go inside to make the purchase?

A Yes.

Q Was the informant equipped with a recording device?

A Yes.

Q Was that recording device working?

A Yes.

Q Did you follow your procedures regarding searching the vehicle of the informant before he or she went inside?

A I did.

Q And was the person of the informant searched for any drugs on his or her person before they went inside?

A Yes.

Q And were the results of both of those searches negative?

A They were.

Q And after the informant returned from Mr. Britton's Quick Shop, did the informant give you some items?

A Yes.

Q Was it a quantity of drugs?

A It was — yes. Tan powder (sic).

Q Did you also get a tape recording of what had taken place inside?

A I did.

Q And did you review it?

[29]

A Yes.

Q And maintain custody of it?

A Yes.

Q And upon your review, did it reflect that a narcotics transaction had taken place?

A Yes, it did.

Q The items that were turned over to you by the informant, was it sent to a laboratory?

A It was.

Q The Highway Patrol Laboratory?

A It was.

Q Was it found to be 13.59 grams of methamphetamine?

A Yes.

Q I would like to move you a week later to October the 13th of 1993, did you again have the informant go into the Quick Shop?

A Yes.

Q Did you follow the same procedures with respect to searching the vehicle and the person of the informant prior to the informant going in?

A I searched the informant; however, this time, we went in my vehicle. I actually drove the informant to the quick store.

Q It was actually your vehicle?

A Yes.

[30]

Q All Right. Was the search of the informant negative? There were not drugs on the informant prior to the informant going into the Quick Shop?

A That's correct.

Q Was the informant given a recording device?

A Yes.

Q upon return to your vehicle, did the informant turn over a quantity of drugs?

A Yes.

Q Was there also the recording device surrendered back to you?

A Yes, it was.

Q Did you review the tape of what had transpired inside of the Quick Shop?

A I did.

Q And upon your review of the tape, did it reflect a drug transaction that had taken place?

A Yes.

Q You were familiar with the voice of Mr. Britton by personally seeing him and talking with him?

A Yes.

Q Based on your prior knowledge of his voice, did that appear to be the voice of Mr. Britton?

A It appeared to be.

Q And you were familiar with the voice of the [31] informant; is that correct?

A Yes.

Q Did it appear to be the voice of the informant?

A Yes.

Q Did you take precautions to secure the authenticity of the tape? In other words, prevent any additions or deletions from being made on the tape?

A I did.

Q Now, the quantity that was turned over to you by the informant, was that also sent to the Highway Patrol Laboratory?

A Yes.

Q Was it analyzed to be 13.21 of methamphetamine?

A Yes.

Q Did your investigation continue on December the 7th of 1993?

A Yes.

Q Again, did the informant go into the Quick Shop of Mr. Britton?

A Yes.

Q Were you a surveilling officer again?

A I was.

Q Were the same procedures followed with respect to the search of the vehicle of the informant and the person of the informant?

[32]

A Yes.

Q Did that search meet with negative results for the presence of contraband?

A It did.

Q And was the informant wearing a recording device on this occasion?

A Yes.

Q Upon return from the Quick Shop, did the informant immediately come to where you were located?

A Yes.

BEST AVAILAB

Q And did the informant turn over a quantity of what you believed to be drugs?

A Yes.

Q And was the recording device surrendered to you?

A It was.

Q Did you review the tape of what had taken place inside the Quick Shop?

A I did.

Q And again, did it appear to you to be the voice of the informant as well as the defendant, Mr. Britton, on the tape?

A Yes.

Q Did it confirm to you upon your review and your experience as a law enforcement office in narcotics that a narcotics transaction took place?

[33]

A Yes.

Q Did you preserve the tape?

A I did.

Q And the quantity of the substance that was surrendered to you to be drugs, was it sent to the laboratory?

A It was turned over to a DEA agent. Sent to the DEA laboratory.

Q Was it analyzed and found to be 27.6 grams of methamphetamine with a purity level of 39 percent?

A It was.

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Q I would like to take your attention to January the 4th of 1994, On this occasion, did the informant as well as an undercover officer go inside of Britton's Quick Shop?

A Yes.

Q The undercover officer would have been Officer Jana Malady?

A That's correct.

Q And at that time, was the vehicle as well as the person of the informant searched before the informant went into the Quick Shop?

A Yes.

Q And did it meet with negative results for the presence of drugs?

[34]

A It did.

Q And was there a recording device also employed on this occasion?

A Yes.

Q And upon the return of the undercover officer as well as the informant, were there any items displayed to you that had been purchased during that transaction?

A Yes.

Q And were they sent to the lab?

A They were.

Q And were they analyzed and found to be 27.13 grams of methamphetamine — cocaine. Excuse me — and 430.29 grams of marijuana?

A Yes.

Q That would be roughly a pound of marijuana and an ounce of cocaine; is that correct?

A Yes.

Q Did you review the tape of what had transpired inside?

A Officer Malady maintained control of that.

Q Because she was inside for that particular buy?

A She prepared the report for this particular one.

Q Okay. With respect to the weapon, there's been some question raised. When the defendant was arrested on September the 29th of 1994, was he taken into custody and [35] brought to the federal courthouse?

A Yes.

Q And while he was in the federal courthouse, was there an interview of the defendant conducted in your presence?

A There was.

Q Was he advised of his rights prior to conducting the interview?

A Yes, he was.

Q Did he waive his rights and make at least a partial statement?

A He did

Q And among the contents of the statement made, did he refer to a Browning high-powered nine-millimeter semiautomatic handgun?

A Yes.

Q In his place of business?

A Yes.

Q Can you tell the Court what he said about the weapon?

A He said he carried it during all of his transactions because of the amount of monies that was involved.

Q That was as specific as he got?

A Basically, yes.

Q You didn't question him beyond that?

A No.

Q Okay. In all the transactions, he said he carried **[36]** it?

A That's what he said.

MR. POEHLING: That [sic] ;you very much, Trooper.

CROSS-EXAMINATION

Q (BY MR. WILLBRAND) You were aware that he was a businessman operating a business?

A Yes.

Q And when he speaks of "transactions," he might have been talking about transactions in connection with operating a business?

A He could have been.

Q Could have been?

A I didn't press it.

Q Okay. And also I gather that you attempted to purchase something from Mr. Britton?

A Yes, I did.

Q And he refused to sell?

A He refused to sell to me, yes.

Q And apparently, there was a statement in your report that you say that he was referring to a source as "a female"?

A That's — yes.

Q And, as a matter of fact, did he mention a Mrs. Schrum?

A He did.

[37]

Q And did he explain to you that he started using marijuana; and that the Schrums owed him some money. And instead of paying him in money, they paid him in drugs:

A Yes.

Q And that's how he got involved in this?

A That's what he told me.

MR. WILLBRAND: Thank you very much.

REDIRECT EXAMINATION

Q (BY MR. POEHLING) So he didn't deny to you that he was selling drugs at all? He just said that he wouldn't sell to you?

A He said he wouldn't sell to me.

Q And he identified his source for you?

A Said it was a female is all he said. Not by name.

MR. POEHLING: Okay

RECROSS-EXAMINATION

Q (BY MR. WILLBRAND) In other words, he was telling you that he would only deal with Haggert; is that it?

A Excuse me?

Q He would just deal with Haggert; is that what you're saying?

A That's not what he told me. He said he would not deal with me.

Q He refused to deal with you.

MR. POEHLING: That's all I have.

[38]

THE COURT: Thank you. You can step down.

MR. POEHLING: I have Officer Malady with respect to the one buy she was present on for the 4th.

JANA MALADY

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (BY MR. POEHLING) Would you state your name, please?

A Jana Malady.

Q Are you a law enforcement officer from St. Francis County?

A Yes, sir, I am.

Q And you testified in the case and in the prosecution of Richard Britton; is that correct?

A Yes.

Q And I'd like to direct your attention to January the 4th of 1994. Did you have occasion to got [sic] to Britton's Quick Shop in Hillsboro? The Hillsboro area?

A Yes, I did.

Q And when you went there, were you assuming a role as an undercover officer?

A Yes.

Q And basically the focus of that role was that you were interested in purchasing drugs from Mr. Britton; is that correct?

[39]

A Yes, it was.

Q And along with yourself, there was a confidential informant present; is that correct?

A Yes.

Q And was the confidential informant in possession of a recording device?

A Yes.

Q And did you furnish that recording device to the informant?

A Yes, I did.

Q And was the informant searched prior to going in to determine whether or not there were any drugs on the informant's person?

A Yes.

Q And was that search negative?

A Negative.

Q When you were inside the residence, did you meet with Mr. Britton?

A Inside the Quick Shop.

Q I'm sorry. Not the residence. The Quick Shop?

A Yes.

Q Okay. We're talking here about the man here with the open-collared shirt and the blue blazer in court?

A Yes, sir.

Q And when you met with him did you purchase drugs? **[40]** Did you and the informant purchase drugs?

A Yes, we did.

Q And did you purchase approximately an ounce of cocaine which actually analyzed out to be 27.13 grams of cocaine?

A Yes.

Q And was there also a pound of marijuana purchased, which weighed out to be 430.29 grams of marijuana; is that correct?

A Yes, there was.

Q And you gave Mr. Britton $3200 for those drugs?

A Yes, I did.

Q And those drugs were kept in your custody until they were sent to the lab; is that correct?

A Yes.

Q And you were present the whole time the informant was in there dealing with Mr. Britton and you were dealing with Mr. Britton?

A :Yes, I was.

MR. POEHLING: Okay. Thank you very much.

CROSS-EXAMINATION

Q (BY MR. WILLBRAND) You're testifying on the basis of what you recall here today?

A Yes, sir. I don't have the report in front of me.

Q This is based on what you recall?

[41]

A Yes.

Q Okay. And you say that there was $1600 give?

A No, sir. There was $3200.

A I gave him $1600, and the CI also gave him $1600.

Q The confidential informant? The same one we've been talking about in the past here?

A Yes.

Q Okay. And he didn't give you anything in return for that; did he?

A No, sir. He directed someone else to give it to us.

MR. WILLBRAND: Thank you very much.

REDIRECT EXAMINATION

Q (BY MR. POEHLING) That was done at the location of the Quick Shop; is that correct?

A Yes, it was.

Q So you actually made the purchase that day that you were there?

A Yes.

Q He just used an intermediary to actually hand it over to you?

MR. WILLBRAND: Object to the leading of the witness, Your Honor.

THE WITNESS: I was —

THE COURT: Just a moment.

[42]

Q (BY MR. POEHLING) Let me rephrase it. Did he actually put it in your hand? "He," meaning Mr. Britton?

A No.

Q How was it given to you?

A It was given to me by someone he directed to give it to me.

Q Okay. Do you know the name of that person?

A Yes, I do.

Q And who was that?

A Chuck. He went by the name of "Chuckie." And I would have to review my report. We got his name off of a license plate.

Q He was present there?

A Yes, he was.

Q Does he have a connection to Mr. Britton that you know of?

A The connection was that he worked for Mr. Britton at the time around the store and through statements made during — can I continue?

Q I'm sorry. When you were negotiating price and quantity, you weren't talking to Chuckie?

A No, sir.

Q Who were you talking to?

A I was talking to Mr. Britton.

MR. POEHLING: Okay. Thank you.

[43]

RECROSS-EXAMINATION

Q (BY MR. POEHLING) Just one question, Your Honor. You didn't hear Mr. Britton speak to Chuck; did you?

A Yes, I did.

Q You did? What did you hear him say?

A He told Chuckie that he would be with him in just a minute.

Q He Told Chuck —

A As he exited the office while we were in there. And then while he was leaving the office, I had paid him the money. And I asked him where the product was, and he said, "Chuck will give it to you. He'll drop it in your lap."

MR. WILLBRAND: Nothing further.

MR. POEHLING: That's all I have.

THE COURT: Thank you. You may step down.

MR. POEHLING: Your Honor, that would conclude the government's presentation of this evidence with respect to the issues of related conduct drug sales.

THE COURT: All right. Mr. Willbrand, do you have any testimony that you want to offer?

MR. WILLBRAND: He doesn't want to testify any further, Your Honor.

THE COURT: Mr. Britton doesn't have to testify, but do you have any other testimony?

[44]

MR. WILLBRAND: No, Your Honor.

THE COURT: All right. With respect to the paragraph four which recites other drug sales, based on the testimony, the Court finds that the information in the presentence report is supported by the testimony, and the Court will overrule the object [sic] to paragraph four. The objection to paragraph five concerns the firearm that was found at the time of Mr. Britton's arrest. And again, the testimony, as well as the information contained in the report itself indicate that it was not clearly improbable that the firearm in question was connected with Mr. Britton's drug activities; therefore, the Court will overrule the objection to paragraph five. I believe that takes care of all of the objections. You can correct me if I'm wrong. The government filed no objections; is that correct?

MR. POEHLING: That's correct, Your Honor.

THE COURT: The Court will adopt the factual statements contained in the presentence report as its Findings of Fact and determines that the applicable guidelines are those that are set forth in the report. Is there any reason that the Court should not proceed now to impose sentence?

MR. WILLBRAND: No legal reason, Your Honor.

MR. POEHLING: I know of no reason, Your Honor.

[45]

THE COURT: Mr. Britton, if there is anything that you would like to say in mitigation of sentencing, this is your opportunity to do so. Your lawyer will have an opportunity as well to speak for you. You're not required to say anything at all, but if you want to say something, I'm willing to listen to you.

THE DEFENDANT: I would like to apologize to my family for getting involved in all of this. That's all.

THE COURT: Thank you. Mr. Willbrand?

MR. WILLBRAND: Judge, I believe that, as you know, this is his first conviction. He's about 36 or 38 years of age.

THE DEFENDANT: Forty-one.

MR. WILLBRAND: Forty-one years of age. And he hasn't been getting involved with the law in order to make a living, certainly, or to avoid work. He works sometimes 18 hours a day trying to keep his business going. A lot of times his employees won't show up, and he'd have to work a full day and work the nightshift. And he's been hard-working throughout his entire life. He's a family man. He has a child, as you know. And; so he's certainly not a career criminal or anything like that. I think he did get involved in using marijuana, which probably led to the trouble that he's in. He is susceptible to stress, and he turns to marijuana, at least he did. I **[46]** don't think he's going to do that anymore. But he would turn to marijuana because of his stress. And I don't see him driving a big car. He has a 1986 Blazer that he's driving, and I think he's been a law-abiding citizen, a businessman, who kept his business going for many years with hard work. And this being his first involvement, I would think that perhaps a departure from the guidelines might be considered by Your Honor, in view of the circumstances of this case.

THE COURT: Thank you. Mr. Poehling?

MR. POEHLING: My only comment would be that there is absolutely nothing in the record to suggest a downward departure that would be appropriate in this case, Your Honor. Beyond that, I have no comment to make.

THE COURT: Well, I don't see anything that has been presented to me that would constitute grounds for a downward

departure in this case, and the Court therefore will not be departing downward from the guideline range. I think that you are very highly regarded in your community, Mr. Britton. I think that's reflected in all of the letters that I have received. I don't know whether the faith and trust that people have in you is misplaced. I think perhaps it is, because there's no question in my mind that you've been involved in some activities that certainly didn't do your community much good and didn't do [47] yourself any good either. The circumstances of this case, as I said before, don't, in my opinion, warrant any kind of departure from the guidelines. And I think that although, to some extent, when I looked at all of the relevant conduct, it occurred to me that this is probably one of the situations where the guidelines have maybe going awry, because here, we've got an offensive conviction that involved a very small amount of drugs, but there were other drug sales that preceded and some other things that happened that really booted your criminal history or your offense level a lot higher than it might otherwise have been. I can't say that I've ever seen a case that started out one way and ended up another in the same way that this did. But, that being the case, the defendant having been found guilty of the sole count of the indictment and the Court having entered judgment upon the jury's verdict, it's now the judgment of the Court that the defendant, Richard Britton, be committed to the custody of the Bureau of Prisons to be imprisoned for a term of 97 months. Following release from imprisonment, the defendant will be placed on supervised release for a term of three years. Within 72 hours of your release from the custody of the Bureau of Prisons, you are required to report in person to the probation office in the district to which you are released. The defendant's [48] condition of supervised release will be the same as the standard conditions that have been adopted by this Court, and the defendant shall also comply with the additional conditions that he participate in a program of testing and treatment for substance abuse as directed by the probation office; and that he remain in

such a program until released by the probation office and subject to the condition that the defendant participate in a program of mental health treatment as approved by the probation office. As I said before, the defendant does not have the financial means to pay a fine. No fine will be imposed for that reason. There is a $50 special assessment which is mandatory. If it has not already been paid, it is due and payable immediately. Mr. Britton, you have the right to appeal the jury's verdict as well as this sentence. And if you wish to take an appeal, you must do so within ten days from today. If you fail to appeal within the ten-day period, that will result in a loss of your right to an appeal. You are entitled to be represented by a lawyer on appeal. If you can't afford to hire one, one will be appointed for you free of charge at your request. You are also entitled to process your appeal free of charge, so if you don't have money to pay the fees for processing it, that will be waived in your case. If you make the request of the Clerk's Office, someone there will **[49]** prepare and file the Notice of Appeal for you. Do you have any questions at all about your appeal rights?

THE DEFENDANT: No.

THE COURT: Anything else?

MR. WILLBRAND: For the record, I understand that he has employed a Mr. Watkins to file an appeal; is that correct?

THE DEFENDANT: Yes.

MR. WILLBRAND: He's going to file a Notice of Appeal. He's saying "Yes," that's the case.

THE COURT: I don't know if Mr. Watkins is here. But someone needs to let him know that the clock has started ticking, so that he's aware of what the deadline is for filing the appeal. Anything else?

MR. POEHLING: Nothing else.

MR. WILLBRAND: Thank you for your courtesy, Your Honor.

THE COURT: The defendant will be remanded to custody. We're adjourned.

(Whereupon, the proceedings concluded at 11:15 a.m.)

UNITED STATES OF AMERICA)

vs.) 4:94-CR--276-CEJ

RICHARD W. BRITTON)

CERTIFICATE

I, GARY BOND, Certified Shorthand Reporter and Registered Merit Reporter, hereby certify that I am a duly appointed, qualified, and acting Official United States Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case; and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Saint Louis, Missouri, the 27th day of March, 1995.

/s/ Gary Bond
Gary Bond
Official United States
Court Reporter
United States District Court
Eastern District of Missouri